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Public Prosecutor v Sumon Khan & Anor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL Q-05(LB)-182–05 OF 2017
IDRUS HARUN, ZABARIAH YUSOF AND YEOH WEE SIAM JJCA
9 OCTOBER 2018

C *Criminal Procedure — Appeal — Appeal against acquittal and discharge — Accused persons charged under Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 — Accused persons acquitted and discharged — Whether learned judge erred — Whether elements of common intention established — Anti-Trafficking in Persons and Anti-Smuggling of* D *Migrants Act 2007 ss 26A & 26G — Penal Code s 34*

This was an appeal by the prosecution against the order of acquittal and discharge of two accused persons at the end of the prosecution's case. The accused persons were charged together with Sivasankar a/l Narayanan E ('Sivasankar') to carry out smuggling of migrants ('13 people of Bangladeshi') on 23 August 2016 at Sibu Airport punishable under ss 26G and 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act'). However, Sivasankar was never charged. The learned trial judge found that the prosecution failed to prove a prima facie case against the accused F persons and thus were acquitted and discharged on the charges preferred against them, without their defence being called. Hence the appeal by the prosecution herein.

Held, dismissing the appeal and affirming the decision of the learned trial G judge:

(1) There could not be any smuggling of the said 13 Bangladeshis unlawfully as migrants as they all had valid passports and visas properly issued under s 10 read with s 6(1)(a) of the Immigration Act 1959/63. The reliance of H the prosecution on the evidence of Azuani bt Jamil, an Immigration Officer ('PW7'), PW8, and Khazarania Khaidir, an Immigration Officer ('PW9') to support the charge against the first accused to show the act of smuggling of migrants was indeed misplaced. The evidence of Sathiaseelan a/l Poongavanam, a lorry attendant ('PW5') also did not I help the prosecution's case, namely that it did not establish a link between the first accused to the charge preferred (see paras 27 & 37–38).

(2) The 13 depositions ('ID7') did not implicate the first and second accused and/or Sivasankar that each of them was instrumental in part of the plan to smuggle the said 13 Bangladeshis into Malaysia using unlawful means.

Therefore, the learned trial judge did not err when His Lordship refused to admit and placed no weight to the depositions of the 13 Bangladeshis ie ID7. Regarding the notes of proceedings from magistrates court ('ID8'), the learned trial judge did not err when His Lordship did not admit ID8 as exhibit when it was tendered by the investigating officer ('PW11') who was in no position to verify that the notes were the very notes from the relevant court proceedings (see paras 45–46 & 48).

(3) Essential elements of s 34 of the Penal Code were never established through the evidence that was before the court. There was no evidence of common intention of the first accused together with the second accused and/or Sivasankar or which implied that they were acting in concert. Neither was there evidence to show that the first accused's act was pursuant to any prearranged plan. The essential element of the offence of smuggling migrants was not made out against the second accused because his role, as instructed by Sivasankar, was to assist while the said 13 Bangladeshis were in Sibu only. Since the role of the second accused was only confined to Sibu, which was not an international airport, there could not be smuggling of migrants between countries. Therefore, the second accused could not be said to have any common intention with Sivasankar to carry out the smuggling of migrants (see paras 61 & 63–64).

[Bahasa Malaysia summary

Ini adalah rayuan oleh pihak pendakwaan terhadap perintah pembebasan dan pelepasan dua orang tertuduh di akhir kes pendakwaan. Tertuduh telah dituduh bersama Sivasankar a/l Narayanan ('Sivasankar') untuk menjalankan penyeludupan migran ('13 orang Bangladesh') pada 23 Ogos 2016 di Lapangan Terbang Sibu yang boleh dihukum di bawah ss 26G dan 26A Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 ('Akta'). Walau bagaimanapun, Sivasankar tidak pernah didakwa. Hakim yang bijaksana mendapati bahawa pihak pendakwaan gagal membuktikan kes prima facie terhadap tertuduh dan dengan itu dibebaskan dan dilepaskan atas tuduhan yang dikenakan terhadap mereka, tanpa memanggil pembelaan. Oleh itu rayuan ini oleh pihak pendakwaan.

Diputuskan, menolak rayuan dan mengesahkan keputusan hakim yang bijaksana:

(1) Tiada penyeludupan 13 orang Bangladesh yang menyalahi undang-undang sebagai migran kerana mereka semua mempunyai pasport yang sah dan visa yang dikeluarkan dengan sah di bawah s 10 dibaca bersama s 6(1)(a) Akta Imigresen 1959/63. Kebergantungan pihak pendakwaan atas keterangan Azuani bt Jamil, Pegawai Imigresen ('PW7'), PW8, dan Khazarania Khaidir, Pegawai Imigresen ('PW9') untuk menyokong pertuduhan terhadap tertuduh pertama untuk

menunjukkan tindakan penyeludupan pendatang adalah tidak tepat. Keterangan Sathiaseelan a/l Poongavanam, seorang atendan lori ('PW5') juga tidak membantu kes pendakwaan, iaitu tidak menimbulkan hubungan antara tertuduh pertama dengan pertuduhan yang dikenakan (lihat perenggan 27 & 37–38).

(2) 13 deposisi ('ID7') tidak membabitkan tertuduh pertama dan kedua dan/atau Sivasankar yang masing-masing memainkan peranan sebagai sebahagian daripada rancangan untuk menyeludupkan 13 orang Bangladesh tersebut ke Malaysia menggunakan cara yang menyalahi undang-undang. Oleh itu, hakim yang bijaksana tidak terkhilaf apabila beliau enggan mengakui dan tidak memberikan berat kepada deposisi 13 orang Bangladesh iaitu ID7. Mengenai nota prosiding dari mahkamah majistret ('ID8'), hakim yang bijaksana tidak terkhilaf apabila beliau tidak mengakui ID8 sebagai ekshibit ketika ditender oleh pegawai penyiasat ('PW11') yang tidak ada kedudukan untuk mengesahkan bahawa nota itu adalah nota-nota dari prosiding mahkamah yang berkaitan (lihat perenggan 45–46 & 48).

(3) Elemen-elemen penting s 34 dari Kanun Keseksaan tidak pernah dibuktikan melalui keterangan yang ada di hadapan mahkamah. Tiada bukti niat bersama yang tertuduh pertama bersama tertuduh kedua dan/atau Sivasankar atau yang tersirat bahawa mereka bertindak secara bersama-sama. Juga tiada bukti untuk menunjukkan bahawa perbuatan tertuduh pertama adalah mengikut rancangan yang telah ditetapkan. Elemen penting dari pertuduhan penyeludupan migran tidak dilakukan oleh tertuduh kedua kerana peranannya, sebagaimana yang diarahkan oleh Sivasankar, adalah untuk membantu ketika 13 orang Bangladesh itu berada di Sibu saja. Memandangkan peranan tertuduh kedua hanya terhad kepada Sibu, yang bukan lapangan terbang antarabangsa, dengan itu tiada penyeludupan migran antara negara. Oleh itu, tertuduh kedua tidak boleh dikatakan mempunyai niat bersama dengan Sivasankar untuk menjalankan penyeludupan migran (lihat perenggan 61 & 63–64).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 231–241.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor [1987] 2 MLJ 336, SC (refd)
Bashir v State AIR 1953 All 668, HC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Hari Ram v State of Uttar Pradesh [2004] 3 LRI 523, SC (refd)

Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643, FC (refd)
Mahbub Shah v Emperor (1945) 47 BOMLR 941, HC (refd)
Manikumar a/l Sinnapan & Ors v PP [2016] 12 MLJ 1, FC (refd)
PP v Ayyavoo a/l Subramaniam & Anor [2004] 6 MLJ 511, HC (refd)
PP v Dato' Saidin bin Thamby [2012] 3 MLJ 476; [2012] 4 CLJ 15, CA (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)
Singapogu Anjaiah and Others v State of Andra Pradesh [2008] Indlaw AP 789 (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 26A, 26G, 61A, 61A(3), (3)(a), (3)(b), 61A(4)
Immigration Act 1959/63 ss 2, 6, 6(1), (1)(a), (1)(c), 10, 15
Passports Act 1966 s 2(1)
Penal Code s 34

Appeal from: Criminal Trial Nos SBW-45SO-1/10 of 2016 and SBW-46SO-1/11 of 2016 (High Court, Sibu)

Tengku Intan Suraya bt Tengku Ismail (Attorney General's Chambers) for the appellant.
Augustine Liom (Tang & Co) for the first respondent.
Shankar RP Asnani (Daniel CL Ling with him) (Thomas, Shankar Ram & Co) for the second respondent.

Zabariah Yusof JCA:

[1] This appeal is by the prosecution against the order of acquittal and discharge of two accused persons, Sumon Khan and Mohammed Yazir bin Openg, at the end of the prosecution's case.

[2] Having heard counsel for both parties and perused through the appeal records, unanimously, we found that there are no merits in this appeal for us to intervene on the order of acquittal and discharge by the learned trial judge. We therefore dismissed the appeal and affirmed the decision of the learned trial judge. Herein below are our reasons for doing so.

[3] At this juncture, it is pertinent to state this: in the present appeal Sumon Khan is cited as the first respondent and Mohammed Yazir bin Openg as the second respondent. However, in our judgment herein, the accused persons will be referred to as they were referred to, by the learned trial judge in his grounds of judgment, ie:

(a) Mohammad Yazir bin Openg as the first accused; and

(b) Sumon Khan as the second accused.

BACKGROUND

[4] The charge against the first accused, is as follows:

> That you together with Sumon Khan (Passport No: BC08666759) and Sivasankar a/l Narayanan (NRIC No: 680822-08-5341) on 23rd August 2016 at Sibu Airport in the District of Sibu, in the state of Sarawak in furtherance of a common intention, carried out smuggling of migrants (13 people of Bangladeshi) and therefore you have committed an offence punishable under section 26G of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM 2007) and read together with section 34 of the Penal Code.

[5] The charge against the second accused, is as follows:

> That you together with Sivasankar a/l Narayanan (NRIC No: 680822-08-5341) on 23rd August 2016 at Sibu Airport in the District of Sibu, in the state of Sarawak in furtherance of a common intention, carried out smuggling of migrants (13 people of Bangladeshis) and therefore you have committed an offence punishable under section 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM 2007) and read together with section 34 of the Penal Code.

[6] Sivasankar a/l Narayanan ('Sivasankar') was never charged.

[7] The names and particulars of the 13 Bangladeshi migrants, who are the subject matter of the two charges against the two accused are:

(a) Orjun Sarkar;

(b) Md Rabin Hossain;

(c) Md Al Mamun Sikder;

(d) Mohamad Somsher Alam;

(e) Abujar Hossain Molla;

(f) Munir Hossain;

(g) Milon Sheikh;

(h) Aowlad Hossain;

(i) Bablur Rahman;

(j) Md Selim Uddin;

(k) Kawsar Khan;

(l) Shamim Pathan; and

(m) Juwel Munshi.

[8] Both the accused persons were jointly tried in one trial.

[9] For ease of reference, the provisions of ss 26A and 26G of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act') under which the first and the second accused persons were charged read as follows:

Section 26A:

> 26A Any person who *carries out smuggling of migrants* commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine, or to both. (Emphasis added.)

Section 26G:

> 26G(1) Any person who, *directly or indirectly, provides or makes available financial services or facilities* —
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> (a) intending that the services or facilities be used, or knowing or having reasonable grounds to believe that the services or facilities will be used, in whole or in part, for the purpose of committing or facilitating the commission of *an act of smuggling of migrants,* or for the purpose of benefiting any person who is committing or facilitating the commission of *an act of smuggling of migrants*; or
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> (b) knowing or having reasonable grounds to believe that, in whole or in part, the services or facilities will be used by or will benefit any person involved in an *act of smuggling of migrants*,
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> commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding ten years, and shall also be liable to fine, or to both.
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> (2) For the purpose of subsection (1), 'financial services or facilities' include the services and facilities offered by lawyers or accountants acting as nominees or agents for their clients. (Emphasis added.)

THE FINDINGS OF THE LEARNED TRIAL JUDGE

[10] At the end of the prosecution's case, the learned trial judge found that, all the 13 Bangladeshis have valid Bangladesh passports and each of them has a valid Malaysia single entry visa. There was no evidence to show that the said 13 Bangladeshis came into Malaysia or Sarawak on 23 August 2016 as smuggled migrants.

[11] As the 13 Bangladeshis have valid passports and valid visas on them, there was thus no necessity for the first accused to arrange, facilitate or organise directly or indirectly the unlawful passing through Sarawak of the said 13 Bangladeshis because their entry and exit were not unlawful or illegal. There was no evidence to show that the first accused had anything to do with their entry.

A **[12]** It was the finding of the learned trial judge that there was no evidence to show that the first accused smuggled the 13 Bangladeshis unlawfully or illegally from Bangladesh and into any part of Malaysia or out of Malaysia (exit from) 'either knowing or having reasonable grounds to believe that the person's entry or exit is unlawful'.

B

[13] Given the findings of the learned trial judge that there is no evidence showing that the first accused directly or indirectly providing or making available financial services or facilities for the purpose of committing or facilitating the commission of an act of smuggling of migrants, the learned trial C judge found that the prosecution failed to prove a prima facie case against the first accused for an offence under s 26G of the Act.

[14] The second accused was charged under s 26A of the Act, ie that he, in D furtherance of a common intention of the first accused and Sivasankar, carried out smuggling of the said 13 Bangladeshis.

[15] In light of the court's earlier finding that the said 13 Bangladeshis could not have entered Malaysia unlawfully because they all had valid passports and E valid Malaysian single entry visas on 23 August 2016, there cannot be any unlawful smuggling of the said Bangladeshis as migrants by unlawful or illegal ways and means at Sibu Airport because at that point, there was no cross border smuggling. More so, as Sibu is not an international airport and there can be no cross-border entry and exit at Sibu Airport. The Act concerns cross border or F international exit or entry into or out of Malaysia. It is an essential element of the offence of 'smuggling of migrant' that there must be arranging, facilitating or organising of the person's unlawful entry or unlawful exit of cross border countries. The place specified in the charge against the second accused is Sibu Airport, Sibu, Sarawak.

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[16] The learned trial judge found that the role by the second accused was confined to looking after the 13 Bangladeshis in Sibu including purchasing flight tickets to Kuala Lumpur International Airport (KLIA) from Sibu, H Sarawak. It does not involve facilitating or arranging for unlawful entry or unlawful exit of the said 13 Bangladeshis, into or out of Malaysia. When the Bangladeshis were in Sibu, Sarawak, they were already in Malaysia. Subsequently, when they flew to KLIA, they cannot be said to be exiting Malaysia.

I

[17] Hence, it was the findings of the learned trial judge that the essential element of the offence of smuggling of migrants, namely, to arrange the said 13 Bangladeshis to enter or exit Malaysia illegally or by unlawful ways is not made out against the second accused because his role as instructed by Sivasankar is to

assist while the 13 Bangladeshis were in Sibu only. There was no evidence to establish that he was involved in cross border or international smuggling of the migrants.

[18] Consequently, the second accused cannot be said to have common intention with Sivasankar to carry out smuggling of migrants at Sibu Airport between countries. Thus the element of common intention cannot be made out as the second accused had nothing to do with the smuggling of migrants (if any) at points of entry.

[19] The learned DPP attempted to adduce the depositions of the 13 Bangladeshis (ID7 (1–13)), as evidence to support the charge of smuggling of the 13 Bangladeshis. However, the learned trial judge found that the depositions failed to satisfy the requirements of s 61A of the Act, and thus refused to admit it as evidence (which is elaborated later at paras 39–43(a) and (c) of this judgment). The learned trial judge also made a finding that even if the 13 depositions were to be admitted, he attached no weight to the said depositions, (the reasons as stated at paras 44–46 of this judgment). Therefore in light of this finding and:

(i) the finding that there was no evidence that the first accused smuggled the 13 Bangladeshis unlawfully or illegally from Bangladesh and into any part of Malaysia or out of Malaysia (exit from); and

(ii) the finding that there was no common intention between the first accused, second accused and Sivasankar,

the learned trial judge found that the prosecution failed to prove a prima facie case against the second accused.

[20] As a result, the first and the second accused were acquitted and discharged on the charges preferred against them, without their defence being called. Hence the appeal by the prosecution herein.

OUR FINDINGS

[21] It was the contention of the prosecution that a prima facie case was made out against both the accused persons as the prosecution had adduced credible evidence in proving each and every ingredient of the offences which, if unrebutted would warrant a conviction. Consequently, both of the accused persons ought to be called to enter their defence accordingly.

[22] To establish the offences committed by the accused persons, the prosecution has to prove that:

(a) there was 'smuggling of migrants' under s 2 of the Act; and

(b) there was common intention between the first accused, second accused and Sivasankar to smuggle the migrants using illegal and unlawful means.

[23] Section 2 of the Act defines 'smuggling of migrants' as:

(a) arranging, facilitating or organizing, directly or indirectly, a person's *unlawful entry into or through, or unlawful exit from,* any country of which the person is not a citizen or permanent resident either knowing or having reason to believe *that the person's entry or exit is unlawful;* and

(b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a).

[24] It is of relevance to take note of s 6 of the Immigration Act 1959/63 which reads:

6(1) No person other than a citizen shall enter Malaysia unless —

(a) he is in possession of a *valid Entry Permit* lawfully issued to him under section 10;

(b) his name is endorsed upon a *valid Entry Permit* in accordance with section 12, and he is in the company of the holder of the Permit;

(c) he is in possession of a *valid Pass lawfully* issued to him to enter Malaysia; or

(d) he is exempted from this section by an order made under section 55. (Emphasis added.)

Section 2 of the Immigration Act 1959/63 defines 'Entry Permit' as 'a Permit to enter and remain in Malaysia issued under section 10'. Section 10 of the Immigration Act 1959/63 states that:

10(1) Any person seeking to enter Malaysia who is not entitled so to enter as a citizen or seeking to remain in Malaysia after the expiry of such a Pass may make an application in that behalf in the manner prescribed to the Director General or to such other person whether within or outside Malaysia as the Director General may, from time to time, appoint for the purpose.

(2) Upon application made under subsection (1) and upon payment of the prescribed fees the Director General may issue to the applicant an Entry Permit on such terms and conditions as the Director General may think fit in the prescribed form and shall, if the applicant is required by any written law relating to passports for the time being in force in Malaysia to *have a visa to enter Malaysia, issue a visa to the applicant* on the production by him of his passport or other travel document and on payment of the fee prescribed by the written law and the visa shall remain valid until the expiry or cancellation of the Entry Permit issued to him.

(3) ... (Emphasis added.)

[25] The learned trial judge was of the view that the definition of 'Entry Permit' clearly envisages Malaysia entry visas. There is no definition of 'Visa' under the Immigration Act 1959/63 even though references were made to it. In this regard it is useful to refer to the Malaysia single Entry Visa of each of the 13 migrants wherein it refers to s 2(1) of the Passports Act 1966. Section 2(1) of the Passports Act 1966 provides that:

> 2(1) Every person entering Malaysia from any place beyond Malaysia shall produce to an immigration Officer a passport; and *that passport shall, in the case of a non-citizen, have a valid visa for Malaysia* issued on the authority of and by or on behalf of the Government of Malaysia.

Nowhere in the Passports Act 1966 do we have any definition of 'visa' although it is mentioned in sub-s (1) of s 2 of the same. However, from the reading of ss 2 and 6(1) of the Immigration Act 1959/63, we agree with the learned trial judge that 'Entry Permit' envisages Malaysia entry visas.

[26] For the 13 Bangladeshis, there is no dispute that each of them had a Malaysia single entry visa as can be seen in exhs P5 (1–13). Nowhere in the evidence did the prosecution establish that, at the time of the arrest of the 13 Bangladeshis on 23 August 2016, their Malaysia single entry visas which were issued to them respectively, had been revoked, cancelled or invalidated for whatever reasons or that the criteria for their entry into Malaysia under s 15 of the Immigration Act 1959/63 have not been complied with. Section 15 of the Immigration Act 1959/63 provides that:

> 15(1) Without prejudice to any other provision of this Act prohibiting a person from remaining in Malaysia, a person shall not remain in Malaysia —
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> (a) after the cancellation of any Permit or Certificate under this part;
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> (b) after the making of a declaration under subsection 14(4);
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> (c) after the expiration of the period of any Pass relating to or issued to him; or
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> (d) after the notification to him, in such manner as may be prescribed, of the cancellation, under any regulations made under this Act, of any Pass relating to or issued to him, ...

[27] As the said 13 Bangladeshis' Passports contain valid Malaysia single entry visas, their entry into Malaysia is according to law. Hence, it is the finding of the learned trial judge that there cannot be any smuggling of the said 13 Bangladeshis unlawfully as migrants as they all have valid Passports and Visas properly issued under s 10 read with s 6(1)(a) of the Immigration Act 1959/63. We agreed with such findings of the learned trial judge.

[28] Another issue raised before us by the prosecution, is the absence of the 'entry stamp/chop' into Sarawak or Malaysia or 'exit stamp/chop' from

Sarawak Immigration and also the absence of the 'exit stamp/chop' of 'entry stamp/chop' from Indonesia Immigration. In other words, there are no entry/exit records of the 13 Bangladeshis from Sarawak or Indonesia, in the Malaysian data system.

[29] Be that as it may, there is nothing in the Immigration Act 1959/63, or for that matter, known in law, to show that such situation (foreigners with valid visas issued to enter Malaysia under ss 6(1)(a) and 10 of the Immigration Act 1959/63 but no records of entry) amounts to an offence. In fact the evidence of PW9, Puan Khazarania Khaidir, who is an Immigration Officer in Sibu Airport admitted in her testimony that (Q&A No 722) the data entered for those travellers, foreigners and Malaysians alike, are often lost in the system. This is corroborated by the evidence of PW10, Puan Masyitah Aziz, Deputy Director of Immigration Putrajaya, who said that the said 13 Bangladeshis' passports with the 13 Malaysian single entry visas which were tendered as exhs P5 (1–13) contained the exit chops/stamps from Bangladesh, entry chops/stamps to Indonesia but no exit chops/stamps from Indonesia and entry chops/stamps into Malaysia. PW10 said in cross-examination that a Malaysia single Entry Visa grants a foreigner entry to any part of Malaysia and that it is not an offence under the Malaysian Immigration laws if a foreigner does not have an exit chop/stamp from the last country he visited. Our perusal of the Immigration Act 1959/63 supports this. The prosecution submitted that the evidence from PW10 corroborates ID7 (1–13). We do not find how that can be so.

[30] It was also the evidence of PW10 and PW11, the investigation officer, that the said 13 Bangladeshis had entered into Malaysia legally and that they had committed no immigration offence or such other offences. On this issue alone it is difficult to sustain the charge of smuggling of the migrants.

[31] The evidence of PW 11, the investigation officer (pp 189–195 of the notes of proceedings) confirmed that the first accused never saw the 13 Bangladeshis, whose passports and Malaysia single entry visas are valid, and was not involved in the illegal or unlawful smuggling of the said Bangladeshis as migrants from outside and into Malaysia and/or within or through Malaysia and did not know or had any reason to believe that the said 13 Bangladeshis entry or exit is unlawful. PW 11 in cross-examination also admitted that the first accused had not made any sort of dealings with the 13 Bangladeshis and/or with anyone about the procurement of the 13 Bangladeshis from Bangladesh or from Indonesia or from anywhere to be smuggled into Malaysia. PW 11 had never asked the first accused if he knew whether the 13 Bangladeshis were smuggled as migrants into Malaysia using unlawful means and ways and using unlawful documentations which disconnected the first accused to the charge. This part of the evidence of PW 11 remained unchallenged.

[32] It is also undisputed that the first accused never met Sivasankar. There is no evidence to link the first accused with Sivasankar. The evidence of PW 11, the investigation officer, showed that the first accused had no dealings with anyone in respect of the said 13 Bangladeshis and as such, there could not be any 'common intention' or agreement with the second accused or Sivasankar in furtherance of any such unlawful or illegal activities of smuggling of migrants (the issue of common intention will be dealt with in the later part of this judgment).

[33] There was also no evidence to show that the first accused had any dealings with the 13 Bangladeshis or Sivasankar for purposes of 'arranging, facilitating or organising, directly or indirectly', their 'unlawful entry into or through, or unlawful exit from Sarawak or Malaysia' either knowing or having reason to believe that the person's entry or exit is 'unlawful'.

[34] The testimony of PW7, Azuani bt Jamil who is an Immigration Officer, sought to implicate the first accused by saying that she was instructed by the first accused, who is her supervisor, to disregard the standard operation procedures ('SOP'), namely to check the passports and identify the Bangladeshis and then to check the validity period given by the immigration in the passports and the details of the Bangladeshis. PW7 said she received instructions from the first accused not to check the boarding passes of the 13 Bangladeshis after stamping their boarding passes. PW7 further said in evidence that when she was arrested on 28 October 2016 and in between 23 August 2016 and 28 October 2016, the first accused had given her a sum of RM2,000 on 27 August 2016 at the Immigration office at Sibu Airport for helping to facilitate the journey of the Bangladeshis to KLIA without any fuss.

[35] The learned trial judge found that the answers given by PW7 in her testimony showed that she is an untruthful witness as she kept changing her answers, to save her own skin and in the process implicated the first accused. This can be discerned from the following:

(a) PW7 said in examination-in-chief that the first accused told her not to follow the SOP and PW 7's testimony in re-examination said that the first accused came to see her. This, the learned trial judge found to be a fabrication as PW 7 said that the first accused only communicated with her on 23 August 2016 through WhatsApp messages. PW7 then told the court that she had deleted the WhatsApp messages and that the first time that PW7 said about the fact that the first accused met up with her on 23 August 2016 was when she gave evidence in court. PW7 never disclosed this even in her examination-in-chief nor in her cross-examination. It is the finding of the learned trial judge that such testimonies of PW7 'are afterthoughts and untruths'. The learned trial judge also found that PW7's testimony that she deleted such WhatsApp

messages raised serious doubts as to whether the first accused did in fact send out any WhatsApp messages instructing PW7 to do anything improper and/or wrong in respect of the said 13 Bangladeshis (para 64 of the grounds);

(b) it was also the finding of the learned trial judge from the evidence of PW7 herself where she admitted that the first accused never suggested to PW7 not to follow the SOP or to disregard the SOP (Q451–459);

(c) PW7 in her evidence also admitted that she erroneously blamed the first accused when in fact the first accused never suggested to PW 7 not to follow the SOP by WhatsApp messages and that, based on the passports and visas of the 13 Bangladeshis shown to PW7, the said 13 Bangladeshis had done nothing wrong or illegal (refer to Q 465, 466). Hence the learned trial judge said that the testimonies of PW 7 should be taken with great caution; and

(d) Further, if what PW7 said was true that the first accused had given RM2,000 to PW7 to facilitate easy entry of the 13 Bangladeshis without adhering to the SOP, then she is an accomplice, and hence her evidence should be supported by independent evidence (refer to *Public Prosecutor v Dato' Saidin bin Thamby* [2012] 3 MLJ 476; [2012] 4 CLJ 15).

[36] The learned trial judge made findings of fact that PW7 was an untruthful witness unworthy of credit. We find that such findings are findings of fact based on the evidence that was before the court and we conclude that the learned trial judge did not err in this respect as he had the audio visual advantage which does not warrant our appellate intervention. The evidence of PW8 also suffers similar fate as PW7. The learned trial judge also viewed the evidence of PW8 with great caution as he was also considered as an accomplice when he said that he accepted corrupt money allegedly paid to him by the first accused on 24 August 2016 and that his testimony was not corroborated by independent evidence. It was also the findings of the learned trial judge that PW7, PW8 and PW9 had discussed the case and they came out with their story that the first accused instructed them to do what they did to save their own skin because PW7, PW8 and PW9 faced the risk of being charged by the police (refer to Q66, 673), and that they were trying to blame the first accused. The reason was that there was no cause for the first accused to expose himself to any alleged wrongdoings or that the first accused had any ulterior motive as he could very well have personally given access to the said 13 Bangladeshis, by going to the Immigration counter to do the stamping of the passports of the said 13 Bangladeshis and there was no need for him to instruct PW7 and PW8 to do anything unlawful, as all the passports and Malaysian single entry visas of the 13 migrants were all proper and valid. There was also no need to pay PW7 and PW8 any alleged corrupt money for such stamping without exposing him to any other purported wrongs.

We are mindful of the trite and oft-quoted principle that a finding of fact by a trial Judge based on credibility of a witness, will only be set aside upon appeal where incontrovertible facts or testimony which are uncontested, show that the trial judge's conclusions are plainly wrong. This is certainly not the case here.

[37] Hence the reliance of the prosecution on the evidence of PW7, PW8 and PW9 to support the charge against the first accused to show the act of 'smuggling of migrants' is indeed misplaced, given the reasons as aforesaid.

[38] The evidence of the prosecution witness, PW5, Sathiaseelan a/l Poongavanam, a lorry attendant also does not help the prosecution's case, namely that it does not establish a link between the first accused to the charge preferred. This is evident from the following evidence:

(a) PW5 said in evidence that he was involved in transporting the 13 Bangladeshis from Bangladesh to KLIA through Sibu. He said that he first saw the 13 Bangladeshis on 20 June 2016 when his employer, Sivasankar, transported the said 13 Bangladeshis from Bangladesh to KLIA through Sibu, Sarawak. He was instructed by Sivasankar on 23 August 2016 to enter the departure hall at Sibu Airport whilst the second accused escorted the 13 Bangladeshis into the departure hall of Sibu Airport and boarded the plane to KLIA;

(b) PW5 said that throughout his dealings with Sivasankar, Sivasankar and PW5 never dealt with the first accused. PW5 said that on 23 August 2016, PW5 and Sivasankar had no arrangements of whatsoever nature in respect of the said 13 Bangladeshis with the first accused directly or indirectly; and

(c) PW5 also admitted that there is no reason for Sivasankar to smuggle the said 13 Bangladeshis using direct or indirect help from the first Accused as there were no dealings with the first accused.

THE ADMISSIBILITY OF ID7 (1–13) AND ID8

[39] In the course of the trial, the prosecution sought to adduce as evidence, the following:

(a) ID7 (1–13), the depositions which were earlier taken from the 13 Bangladeshis pursuant to s 61A of the Act, which were strenuously objected to, by the first and the second accused; and

(b) ID8, which is the notes of proceedings pertaining to the taking of the said 13 depositions of the 13 Bangladeshis before the presiding magistrate.

[40] Section 61A of the Act provides that:

61A Admissibility of deposition of trafficked person or smuggled migrant who cannot be found.

(1) Notwithstanding anything contained in this Act and any written law to the contrary, where in any proceeding for an offence under this Act a testimony of any person in respect of whom an order of removal from Malaysia has been made by the Director General under section 32 or 33 or subsection 56(2) of the Immigration Act 1959/63 is required by the court, there shall be admissible in evidence before that court any deposition relating to the subject matter of that proceeding made by that person —

(a) in Malaysia before a Sessions Court Judge or a Magistrate in the presence or absence of the person charged with the offence; or

(b) outside Malaysia before a consular officer or a judicial officer of a foreign country in the presence or absence of the person charged with the offence, and any such deposition shall, without further proof, be admitted as prima facie evidence of any fact stated in the deposition.

(2) It shall not be necessary for any party in any proceeding to prove the signature or official character of the Sessions Court Judge, Magistrate, consular officer or judicial officer before whom the deposition under subsection (1) was made.

[41] Section 61A(3) of the Act states that:

(3) For the purposes of this section, a reference to —

(a) a 'deposition' includes any written statement made upon *oath; and*

(b) an *'Oath'* includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swear. (Emphasis added.)

[42] The learned trial judge was of the view that, for a deposition to be admissible as evidence, it must fulfill the requirements of s 61A(3)(a) and (b) of the Act. His Lordship was of the view that the depositions ID7 (1–13) failed to fulfill such requirements, as the depositions should be on oath by way of affidavit or statutory declaration. The depositions marked as ID7 (1–13) do not contain the phrases/clauses which should be present at the end of a deposition, as depositions in the form of an affidavit or statutory declaration should contain the following clauses/phrases:

For an affidavit:

Affirmed by the said ... at Bintulu in ...

Before the Commissioner for Oath.

For a Statutory Declaration:

And I make this solemn declaration conscientiously believing the same to be the true and by virtue of the provisions of the Statutory Declaration Act 1960.

Subscribed and solemly declared by the abovenamed at ... in the state of ... On this ... day of 20...

...

Before me,

COMMISSIONER FOR OATHS

The learned trial judge concluded that, as the depositions marked as ID7 (1–13), do not contain the abovementioned phrases/clauses at the end of each deposition, they cannot be said to fall within any of the classification of either legal document as envisaged under s 61A of the Act. We disagree with the learned trial judge for the following reasons:

(a) the terminology 'deposition' as stated in s 61A(3) of the Act *includes any* written statement made upon oath. Further, the word 'oath' *includes* an affirmation or declaration in the case of persons allowed by law to affirm or declare. Clearly, 'deposition' cannot be limited to depositions in the form of an affidavit or a statutory declaration only. We say so due to the word 'includes' which is present in s 61A(3)(a) and (b) of the Act. So long as the deposition is in the form of a written statement made upon oath, that is sufficient;

(b) having perused the depositions ID7 (1–13), we note that it is stated in the beginning of all the depositions that:

> BAHAWASANYA saya ... berumur ... tahun seorang warganegara Bangladesh No Pasport ... dengan ini sesungguhnya mengaku bahawa ....

At the end of all the depositions, it is stated as:

> Dan bahawa saya membuat *perakuan* ini di bawah seksyen 61A Akta Anti Pemerdagangan Orang dan Anti Penyeludupan Migran 2007 (Akta 670) serta mengaku dengan kepercayaan bahawa tiada yang benar melainkan benar berlaka.
>
> | | | |
> |---|---|---|
> | Bersumpah pada hari ini ... hb... 2017 |) | ..... |
> | di Mahkamah Majistret Sepang dalam |) | (Tandatangan) |
> | Negeri Selangor melalui jurubahasa |) | |
> | ..... |) | ..... (Jurubahasa) |
> | 'Yang disebutkan ..... telah |) | Di hadapan saya, |
> | menyempurnakan sumpahnya dan telah |) | |

diterjemahkan dengan sebenar-benarnya	)	
dan boleh didengar akan kandungan	)	
kata-kata sumpahnya itu kepada yang	)	
membuat sumpah iaitu	)	
dan dia mengaku kebenaran sumpah yang	)	.....
dibuat olehnya.	)	Majistret

Hence it is our view that the depositions ID7 (1–13) are written statements made upon oath. 'Oath' under s 61A(3)(b) includes an affirmation or declaration in the case of persons allowed by law to affirm or declare. The deponents of the 13 depositions in ID7 (1–13) clearly stated in their respective depositions '... dengan ini sesungguhnya mengaku ...' in the beginning and 'Dan bahawa saya membuat *perakuan* ini di bawah seksyen 61A Akta ...' at the end, and this clearly amounts to an affirmation as envisaged under s 61A(3)(b) of the same; and

(c) even if the deposition is not in the form of an affidavit or a statutory declaration, as stated by the learned trial judge, that *by itself,* does not mean that it failed as a 'deposition' under the said section. The learned trial judge failed to take into account s 61A(4) of the Act which provides that:

> (4) Nothing in this section shall prejudice the admission as evidence of any other depositions.

This subsection allows a deposition recorded outside s 61A of the Act to be admitted as evidence in a criminal proceeding instituted under the Act. The subsection does not affect the admission as evidence, depositions recorded under any other provision of the Act or any other law. More so, in the present appeal, the depositions ID7 (1–13) were taken before a magistrate, and the deponents had taken an oath and declaration in the Bangladeshi language.

Therefore, we conclude that the learned trial judge erred when he found that the depositions ID7 (1–13) cannot be said to fall within any of the classification of either legal documents under s 61A(3)(a) and (b) of the Act.

[43] However, we agree with the learned trial judge that ID7 (1–13) cannot be admitted on other grounds, namely:

(a) s 61A of the Act also requires that before the depositions of the Bangladeshis can be admitted as evidence, there must be an order for removal of the Bangladeshis issued by the Director General ('DG') of Immigration Department. In the present appeal, there was never any order of removal by the DG of Immigration ever produced by the prosecution. The rationale of allowing admissibility of depositions of migrants persons under s 61A of the Act was to cater for situations where the migrants were removed by order of the DG of Immigration and hence their presence as witnesses could no longer be procured to support a charge under the Act against accused persons. Hence the depositions (which are hearsay evidence) are allowed to be admitted. Without the order for removal, these depositions cannot be admitted. However, the prosecution could still adduce direct evidence by calling the subject ie the migrants themselves to testify, if they could be located. In the present appeal it is not clear whether the migrants were still available to testify or whether there was such an order from the DG of Immigration for their removal. The prosecution attempted to adduce the notes of proceedings from the magistrates court (ID8) which purportedly recorded these depositions and which had referred to the orders for removal by the DG of Immigration of the 13 migrants. However the learned trial judge had refused to admit these notes of proceedings as exhibits (we will elaborate on the admissibility of ID8 at para 47 of this judgment). Therefore, without the notes of proceedings admitted as evidence, ID7 (1–13) have no basis to stand on;

(b) the depositions of the Bangladeshis are undated which raised doubts as to when they were actually deposed. Given the fact that there were no orders of removal by the DG of Immigration produced and that they were undated, there is a likelihood that these depositions could have been made before the order for removal was issued by the DG of Immigration; and

(c) in addition, the seven depositions of Sarkar, Somsher, Molla, Munir, Milon, Selim and Kawsar contain serious factual errors, namely at paras 5 and 6 therein, which state that they landed in KLIA on 13 August 2016 and also flew and landed in Jakarta, Indonesia on the same date which is 13 August 2016. This contradicts with the Immigration stamps in their passports which show that these seven Bangladeshis landed at Soekarno Hatta Jakarta Airport on 14 August 2016, and not on 13 August 2016. These unexplained factual errors raised doubts on the reliability and credibility of the seven depositions by the seven Bangladeshis.

[44] It is also the finding of the learned trial judge that, even assuming that the 13 depositions ID7 (1–13) could be admitted as evidence, there is still the issue of the weight to be attached to the same given that the deponents are not

A subjected to cross-examination. We agree with the analysis by the learned trial judge as to the contents of the depositions to arrive at such conclusion. This is because the contents of the depositions of the 13 Bangladeshis:

(a) did not aver that they wanted to be smuggled as migrants into Malaysia nor did they state that anyone specific and/or any named person/persons told them that they would be brought into Malaysia using unlawful means;

(b) did not state that such person/s told them that they would be brought or smuggled into Sarawak or Malaysia without proper travelling documents or using unlawful papers. In fact the depositions state that '... telah memaklumkan bahawa segala dokumen perjalanan saya ke Malaysia telah siap ...' which gives the indication that all their travel documentation were ready and completed lawfully; and

(c) did not state that they had to engage unlawful/false passports/visas to get them smuggled into Malaysia as migrants and to work illegally.

[45] What is pertinent is that, the 13 depositions did not implicate the first and the second accused and/or Sivasankar that each of them was instrumental in part of the plan to smuggle the said 13 Bangladeshis into Malaysia using unlawful means. There is no evidence that the 13 Bangladeshis had entered Indonesia or Malaysia illegally as it is undisputed that the 13 Bangladeshis had valid single entry visas and passports to enter Malaysia or Indonesia.

[46] Therefore, premised on the aforementioned, the learned trial judge did not err when His Lordship refused to admit and placed no weight to the said depositions of the 13 Bangladeshis ie ID7 (1–13).

[47] As far as ID8 is concerned, although the learned trial judge had referred to it at para 5 in his grounds, he did not accord any reasons as to why it was not marked as an exhibit. It was submitted by the prosecution that ID8 had been properly introduced to court through a person who had access to it ie PW11, the investigation officer. Hence the prosecution submitted that ID8 should be marked as P8. After all, ID8 is the notes of proceedings from the magistrates court.

[48] However, we disagree with the submission by the prosecution on the way the notes of proceedings should be admitted. Notes of proceedings should be tendered through the court registrar, who can confirm its veracity and accuracy. In the present case it was tendered by the investigating officer, PW11, who was in no position to verify that the notes were the very notes from the relevant court proceedings. Hence, the learned trial judge did not err when His Lordship did not admit ID8 as exhibit.

[49] Even, assuming for a moment that His Lordship was wrong in refusing to admit ID8 as an exhibit, one essential point to note is that there is nothing to show the link between the notes of proceedings ID8 to the depositions ID7 (1–13) which were sought to be tendered, as nowhere in the Notes of Proceedings had the depositions been identified. More so, when the depositions ID7 (1–13) sought to be tendered, were undated. Even if there were orders of removal produced at the proceedings before the Magistrate who took the depositions, were these the same depositions (ID7 (1–13)) that were made in relation to the removal or could they have been made earlier before the order of removal. As we said earlier, there is no evidence to link these ID7 (1–13) to the order for removal because the depositions are undated, which creates a doubt as to when the depositions ID7 (1–13) were actually made.

[50] Without these depositions being admitted and/or without the evidence of the 13 Bangladeshis migrants, there can be no case made out against the two accused persons.

[51] Ultimately, it is the finding of the learned trial judge that from the testimonies of the prosecution witnesses; PW5, PW7, PW9 and PW10, it clearly showed that the said 13 Bangladeshis' entry into Malaysia and the flight to KLIA was lawful and there was no necessity for the first accused to assist the second accused and/or Sivasankar directly or indirectly. We find that the learned trial judge did not err in this respect.

THE CONVICTION OF THE 13 BANGLADESHIS BY THE MAGISTRATES COURT, SEPANG

[52] The prosecution in their petition of appeal stated that the learned trial judge erred in law and fact, when His Lordship ruled that the 13 Bangladeshis entered Malaysia lawfully because they all had valid Malaysia single entry visas on 23 August 2016 notwithstanding the evidence from PW11 that the 13 Bangladeshis had been sentenced to three months imprisonment by the magistrates court for an offence under s 6(1) of the Immigration Act 1959/63. Therefore, it was submitted that the learned trial judge erred when he ruled that there was no evidence that the 13 Bangladeshis entered Indonesia and Malaysia illegally.

[53] It was submitted by the prosecution that there were purported pleas of guilt by the 13 Bangladeshis before the Magistrates Court, Sepang under s 6(1)(c) of the Immigration Act 1959/63. However, the full verified true copy of the notes of proceedings in the Magistrates Court, Sepang were never adduced by the prosecution before the learned trial judge in the High Court. Hence what transpired before the Magistrates Court, Sepang was not before the learned trial judge in the High Court. The notes of proceedings which were

attempted to be produced by the prosecution in ID8 showed that the written depositions which were prepared earlier were referred to, read to the deponents and subsequently marked in the proceeding. However, there was nothing shown that the magistrate in that proceeding was appraised of the fact that the 13 Bangladeshis all had valid Bangladeshis passports and in each of their passports the 13 Bangladeshis were issued with a valid Malaysia single entry visa issued by the Malaysian High Commissioner in Dhaka which was never revoked for the duration of their entry into Malaysia. In any event the notes of proceedings of the magistrates court were never admitted as evidence by the learned trial judge in the High Court as the full verified true copy of the notes of proceedings in the magistrates court were never properly tendered nor produced by the prosecution which resulted in the learned trial judge not allowing it to be admitted as evidence. We found no reason for appellate intervention in this respect.

COMMON INTENTION

[54] It was the contention of the prosecution that the first accused was acting in furtherance of a common intention with the second Accused and Sivasankar to commit the offence under s 26G of the Act. However, Sivasankar was not charged and neither was he called to testify.

[55] Section 34 of the Penal Code provides as follows:

> 34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[56] To establish common intention under s 34 of the Penal Code the following elements must be present:

(a) a criminal act;

(b) participation in doing of the act;

(c) a common intention between the parties; and

(d) the act must be done in furtherance of the common intention.

[57] Section 34 of the Penal Code is a rule of evidence which embodies the principle that if two or more persons intentionally do a thing jointly, it is as though each of them had done it individually (*Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643). The section is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them (*Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC)). If it is shown that the

criminal act complained against was done by one of the accused persons in furtherance of the common intention of all, liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone (*Mahbub Shah v Emperor* (1945) 47 BOMLR 941). It is in these circumstances, that the law makes no distinction between them or between the parts played by them in doing the criminal act (*Bashir v State* AIR 1953 All 668). Neither is presence a necessity to constitute participation in every case, but suffice for the accused to have done an act which has some nexus to the offence preferred (*Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37, and *Manikumar a/l Sinnapan & Ors v Public Prosecutor* [2016] 12 MLJ 1). Common intention, requires proof that the criminal act was done in pursuance of a pre-arranged plan (*Mahbub Shah*) or a prior meeting of the minds to commit the offence at the interval prior to the commission of the offence or even if the intention had developed on the spot (*Public Prosecutor v Ayyavoo a/l Subramaniam & Anor* [2004] 6 MLJ 511 at p 512, *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336). The elements of s 34 are best summarised in the recent case of *Singapogu Anjaiah and Others v State of Andra Pradesh* [2008] Indlaw AP 789, where the court held that:

> Section 34 IPC lays down a principle of joint liability in doing a criminal act. The essence of liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of s 34 is element of participation in action. The common intention implies acting in concert, existence of prearranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a prearranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be a pre-arranged or pre-meditated concert ...

In practice, common intention may often be difficult to prove by way of direct evidence, however inference can be drawn from the circumstances of the case and the conduct of the accused (*Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; *Public Prosecutor v Ayyavoo a/l Subramaniam & Anor*).

[58] The learned trial judge ruled that there was nothing to connect the first accused with Sivasankar and the first accused had no dealings with anyone in respect of the 13 Bangladeshis. It was contended by the prosecution that the learned trial judge erred in law and fact in this respect as there is evidence of PW5 who testified that on 20 and 23 August 2016 he received an instruction from Sivasankar to assist the first Accused by transporting the 13 Bangladeshis to KLIA via Sibu Airport. In this respect the learned trial judge who had the

audio visual advantage had made findings of fact that in cross-examination of PW5, he had admitted that 'throughout his dealings with Sivasankar, Sivasankar and PW5 had never dealt with the first Accused'. PW5 also admitted that on 23 August 2016, PW5 and Sivasankar had no arrangements of whatsoever nature in respect of the said 13 Bangladeshis with the first accused directly or indirectly (see para 75 of the grounds of judgment)'. Further PW5 also admitted that there is no reason for Sivasankar to smuggle the said 13 Bangladeshis using direct or indirect help from the first accused because there were no such dealings with the first accused. It was the findings of the learned trial judge that such testimony from PW5 disconnected the first accused from the charge preferred. PW5's admission showed that there cannot be any common intention between the accused persons and Sivasankar (para 76 of the grounds of judgment).

[59] The prosecution contended that the learned trial judge erred in law and fact when he ruled that there was no common intention or agreement between the accused persons and Sivasankar in furtherance of any such unlawful or illegal activities of smuggling of migrants notwithstanding the evidence of PW7 and PW8 who testified that on 23 August 2016 they received instruction from the first accused to facilitate the movements of all 13 Bangladeshis. It is the finding of the learned trial judge that the testimonies of PW7 and PW8 showed that PW7 and PW8 implicated the first accused to save their own skin. It is also the findings of the learned trial judge that both were accomplices and their evidence were untruthful and unworthy of credit. Their evidence was treated with caution by the learned trial judge as there was no independent corroboration of their evidence that they received instruction from the first accused to facilitate the movement of all 13 Bangladeshis. Further, it was also the findings of the learned trial judge that PW7 contradicted her testimony when she testified that the first accused only communicated with her using WhatsApp messages on 23 August 2016. Subsequently, in re-examination PW7 stated that the first accused came to see her. This was never stated by PW7 in her examination-in-chief nor in cross-examination. This clearly contradicted her earlier testimony when she said that the first accused only communicated with her through WhatsApp messages on 23 August 2016 (paras 58 and 59 of the grounds of judgment). The learned trial judge also found that there are serious doubts as to whether the first accused had sent out any WhatsApp messages instructing PW7 to do anything improper and/or wrong in respect of the said 13 Bangladeshis as PW7 said that she had deleted the WhatsApp messages.

As for PW8, his testimony is that he and PW7 came up with the story that the first accused instructed them to do what they did to save their own skin because both PW7 and PW8 faced the risk of being charged by the police in respect of the said 13 Bangladeshis. There was never any re-examination of the

incriminating testimony of PW8 in this respect, thus leading the learned trial judge to make the finding that such answers raised doubts on the testimony of PW8. Further PW8 also admitted in evidence that there was no reason to smuggle the said 13 Bangladeshis as migrants by using unlawful means on 23 August 2016 as they all have valid passports and valid Malaysia single entry visas. We found that the learned trial judge was entitled to make such findings premised upon the evidence and the testimonies which were before him and we have no reasons to intervene in the same.

[60] It is also the finding of the learned trial judge that the first accused never met with Sivasankar who was never called to testify in this case and neither was he formally charged. There is also no evidence to link the first accused with Sivasankar. The investigation officer, PW11 said that the first accused had no dealings with anyone in respect of the said 13 Bangladeshis and as such, there could not be 'common intention' or agreement with Sivasankar in furtherance of any such unlawful activities of smuggling of migrants.

[61] We agree with the learned trial judge's findings that essential elements of s 34 were never established through the evidence that was before the court. The evidence so far adduced failed to establish that there was a criminal act on the part of the accused persons. There was also no evidence of the common intention of the first accused together with the second accused and/or Sivasankar or which implied that they were acting in concert. Neither was there evidence to show that the first accused's act was pursuant to any prearranged plan. Evidence of the prior meeting of minds between the first accused, second accused and Sivasankar, to smuggle the said 13 Bangladeshis was markedly absent. The proof of an act of the first accused which arranged, facilitated or organised, directly or indirectly their unlawful entries into Sarawak and thereafter to bring the alleged smuggled migrants to Kuala Lumpur, was also lacking to sustain the charge.

[62] In the circumstances, we find that the conclusion of the learned trial judge that s 34 is not applicable against the first accused and/or the second accused is correct.

[63] As far as the second accused's role is concerned, it was merely confined to looking after the said 13 Bangladeshis in Sibu including purchasing the flight tickets to KLIA from Sibu, Sarawak and it does not involve facilitating or arranging for unlawful entry or unlawful exit of the said 13 Bangladeshis, into or out of Malaysia. At Sibu, Sarawak, the 13 Bangladeshis were already in Malaysia and when they flew to KLIA they were not exiting Malaysia. Hence the essential element of the offence of smuggling of migrants, that is to arrange the said Bangladeshis to enter and exit Malaysia, is not made out against the

second accused because his role, as instructed by Sivasankar, was to assist while the said 13 Bangladeshis were in Sibu only. He was never involved in cross border or international smuggling.

[64] Therefore, the second accused cannot be said to have any common intention with Sivasankar to carry out the smuggling of migrants. In addition to the failure of the prosecution to adduce any evidence that there was a criminal act committed by the accused persons, and since the role of the second accused was only confined to Sibu, which is not an international airport, there cannot be smuggling of migrants between countries.

[65] Given that:

(a) 'common intention' was not made out between the first accused, second accused and Sivasankar;

(b) the depositions of the 13 Bangladeshis were not admitted as evidence; and

(c) the evidence of PW7, PW8, PW9 was unworthy of credit,

the prosecution has no leg to stand on to sustain a prima facie case against the two accused persons after a maximum evaluation of the evidence led by the prosecution.

[66] Therefore, it is the finding of the learned trial judge that the prosecution has failed to prove a prima facie case against the first accused and the second accused. We agree with such findings.

[67] The appeal by the prosecution is accordingly dismissed. We affirm the order of acquittal and discharge of the first and the second accused in respect of the charges preferred against them, without the defence being called, by the learned trial judge.

Appeal dismissed and decision of learned trial judge affirmed.

Reported by Ahmad Ismail Illman Mohd Razali